No. 84-1667

In The

Supreme Court of the United States

October Term, 1984

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; AND GERALD E. HOSMAN,

Petitioners,

vs.

MATTHEW N. FRASER, A MINOR, AND E. L. FRASER, AS HIS GUARDIAN AD LITEM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the first amendment of the Federal Constitution prohibited public school officials from imposing a three-day suspension from school on a high school student who gave a speech at an all-school assembly containing sexual innuendo, and which was considered indecent, demeaning to female students, and inappropriate by school authorities?

2. Whether a high school disciplinary rule prohibiting students from engaging in conduct "which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures," is unconstitutional on its face under the first amendment and the due process clause of the fourteenth amendment of the Federal Constitution?

3. Whether the failure of school district rules to define each specific form of disciplinary action that could be imposed upon a student violated the due process clause of the fourteenth amendment of the Federal Constiution?

4. Whether the District Court erred in raising and deciding issues of state law *sua sponte* that were neither raised by the pleadings nor tried by the implicit consent of the parties?

LIST OF PARTIES

The parties to this proceeding in the United States District Court for the Western District of Washington, in the Ninth Circuit, and before this Court were Plaintiffs Matthew N. Fraser, a minor, and E. L. Fraser, as his guardian ad litem, the Respondents herein. The Defendants were Bethel School District No. 403, a municipal corporation, Pierce County, Washington; Christy B. Ingle; David C. Rich; J. Bruce Alexander; and Gerald E. Hosman. All of the Defendants are Petitioners herein.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 755 F.2d 1356 (9th Cir. 1985). PA at A1-A65.[1] The oral opinion (PA at B11-B50), Findings of Fact and Conclusions of Law (PA at B1-B10), Injunction and Declaratory Judgment (PA at C1-C3), and Judgment (PA at C4-C5) of the United States District Court for the Western District of Washington, the Honorable Jack E. Tanner presiding, are unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered March 4, 1985. The Petition for Writ of Certiorari by Petitioners was filed April 19, 1985, and was granted October 7, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND SCHOOL DISTRICT RULE INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

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[1] "PA" refers to the Appendix to the District's Petition for Writ of Certiorari, No. 84-1667. "JA" refers to the Joint Appendix.

United States Constitution, Amendment XIV, § 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Bethel High School Disruptive Conduct Rule:

> In addition to the criminal acts defined above, the commission of or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.
>
> . . .
>
> *Disruptive Conduct.*
>
> Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

STATEMENT OF THE CASE

In April of 1983, Plaintiff Matthew Fraser ("Fraser") was a 17-year-old high school senior attending Bethel High School, a public school operated by Defendant Bethel School District No. 403, Pierce County, Washington ("District"). On April 26, 1983, the District conducted an all-school assembly during the regularly scheduled school day that was attended by approximately 600 students. JA at 127. Attendance at the assembly was mandatory for all pupils, unless they chose to report to a study hall. JA at 101

The District convened the assembly for the purpose of campaign speeches for students seeking election as officers of the school's associated student body, a formal organiza-

tion of students established by the District under state law. At the assembly, Fraser gave the following speech:

> I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all, his belief in you, the students of Bethel is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax — for each and every one of you.
>
> So vote for Jeff for ASB vice president — he'll never come between you and the best our high school can be.

JA at 47. During the speech, a school counselor observed students hooting and yelling, and one student simulating masturbation. JA at 36. The counselor observed two other students simulating sexual intercourse by movement of their hips. *Id.* The assembly concluded at its scheduled time and the students were dismissed without further incident. JA at 50.

The next morning, Bethel High School administrators gave Fraser oral and written notice of their allegation that his speech violated the school's disruptive conduct rule. JA at 102. He was given the written evidence school officials had received concerning the allegations against him and an opportunity to explain his conduct. *Id.* After these discussions, Fraser was informed that his speech violated the disruptive conduct rule, that he would be suspended from school for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement ceremony. *Id.*

Fraser grieved the disciplinary action to the District's designated hearing officer, J. Bruce Alexander. After re-

ceiving written argument from Fraser's legal counsel, and reviewing the circumstances surrounding Fraser's conduct, Alexander issued a decision on May 17, 1983. JA at 100-05. The examiner made the following findings:

> 4. The text of the speech contains a number of words and phrases with sexual innuendos and connotations. Matt used dramatic pauses and voice inflection to emphasize the sexual overtones of his speech. During the course of the speech, many students reacted with loud laughing, cheering, whistling, foot stomping, and clapping.
>
> . . . .
>
> 6. On April 27, 1983, at least one teacher wrote to Mr. Rich that the educational process for most of her first period class was disrupted due to a student discussion of Fraser's speech. Student consensus in this class about the speech was negative. The students' statements indicated "they felt embarrassed, disgusted and insulted" by the speech. Classroom disruptions were reported by other teachers following the speech.
>
> . . . .
>
> 9. The speech Matt delivered conveyed a sexual meaning that was indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly. The speech also caused a material and substantial interference of the educational process by provoking a boisterous and unruly response from many students during the assembly and in subsequent school classes.
>
> . . . .
>
> 11. The suspension and discipline imposed on Matt Fraser was not influenced by any prior criticism he has made concerning the school administration and was not intended to suppress ideas or political views.

JA at 101-02. From these findings, the examiner concluded:

> 3. The term "obscene" in the disruptive conduct rule must be given its common and ordinary meaning. Conduct or language is "obscene" if it is "offensive to modesty or decency; indecent, lewd." Random House Dictionary of the English Language, at 994 (1969).
>
> 4. Matt Fraser's speech was obscene within the meaning of the disruptive conduct rule and he violated that rule.
>
> 5. Matt Fraser's speech was conduct that materially and substantially interfered with the educational process in violation of the disruptive conduct rule.

JA at 103-04. The examiner affirmed the discipline in its entirety.

This litigation followed with a complaint filed on May 23, 1983, alleging violations of Fraser's federal constitutional rights under 42 U.S.C. § 1983 (1976) and seeking declaratory, injunctive, and monetary relief. After a one-half day hearing on May 31, 1983, the United States District Court for the Western District of Washington, the Honorable Jack E. Tanner presiding, orally ruled against the District.

On June 8, 1983, the district court issued Findings of Fact and Conclusions of Law, and a Declaratory Judgment and Injunction requiring the District to allow Fraser to speak at the Bethel High School commencement ceremony that evening. The court held that (1) the suspension violated Fraser's rights of free expression under the first amendment of the Federal Constitution; (2) the school's

disruptive conduct rule was unconstitutionally vague and overbroad; (3) the failure of the disciplinary rules to specify removal of a student's name from the list of graduation speaker candidates violated the due process clause of the fourteenth amendment; and (4) *sua sponte*, the District's suspension violated state law. PA at B1-B10, C1-C3. On September 1, 1983, the court entered its final Judgment awarding Fraser $278.00 in damages for violation of his constitutional rights, as well as litigation costs and attorneys' fees in the amount of $12,750.00. PA at C4-C5. The District timely perfected appeals of these judgments to the Court of Appeals for the Ninth Circuit on July 8, 1983, and September 15, 1983.

On March 4, 1985, a three-judge panel of the Ninth Circuit, with the Honorable Eugene A. Wright dissenting, issued an opinion affirming the district court's judgment, but vacating the graduation ceremony injunction as moot.

On April 19, 1985, the District and individual defendants filed a Petition for a Writ of Certiorari in this Court. On October 7, 1985, that petition was granted.

SUMMARY OF ARGUMENT

Question 1. The compelling state interests in public education, including the inculcation of community values, effective student discipline, and local control of educational policy, limit student rights of free expression in the secondary schools.

The District did not violate Fraser's first amendment rights because he failed to show the discipline against him

was motivated by an intent to suppress or otherwise discriminate against his viewpoint. The assembly at which he spoke was not a first amendment public forum, but a nonpublic educational activity. The District's discipline was not only a reasonable and viewpoint neutral regulation of his speech in light of the surrounding circumstances, but also necessary to regulate expressive activity strictly incompatible with the District's educational interests.

The District had authority to regulate Fraser's indecent and offensive sexual talk because it has the responsibility to inculcate community standards of decency and civility in student discourse. The speech was demonstrably disruptive to the District's educational program, and viewpoint neutral regulation in the limited confines of the school environment does not threaten core first amendment values. The discipline was further necessary to protect a captive audience of students from invasion of their privacy rights, to deter unconsented and irresponsible presentation of sexual topics to children, and to dispel any impression that the District tolerated or authorized the speech. Affording indecent student speech constitutional protection also does not further the instrumental values underlying free speech rights of school children.

Fraser failed to make the required threshold showing that the District suppressed his viewpoint. Instead, the record reveals that the discipline was viewpoint neutral, the speech was strictly incompatible with the District's educational activities, and the discipline was both reasonable and necessary to protect constitutionally significant educational interests.

Question 2. The District's disruptive conduct rule is neither unconstitutionally vague nor overbroad. Within

the school environment, the need for discipline can arise in an infinite variety of factual situations, requiring effective and prompt disciplinary action.

Like rules for public employee conduct, school disciplinary rules must contain general proscriptions to be effective. Most federal courts have refused to apply criminal law standards for vagueness and overbreadth to school disciplinary rules, and have correctly held that general proscriptions against disruptive conduct provide fair notice of proscribed conduct to students. The District's interpretation that the "obscene" language proscribed by the rule is language offensive to modesty or decency was a reasonable construction. Given the limitations of language, the potential for students to find new ways to disrupt school activities, and the need to maintain order in the school environment, the rule gave fair notice to Fraser and was not unconstitutionally vague.

These same factors sustain the rule against an overbreadth challenge. The rule is viewpoint neutral on its face and applies only to speech that is not constitutionally protected within the confines of the school environment. Because the rule is designed to prohibit disruptive conduct, and because indecent or profane student language causes a predictable disruption to the learning process, the rule does not pose a significant deterrent to the exercise of first amendment rights. Any potential overbreadth of the District's disruptive conduct rule is neither real nor substantial when judged against its legitimate goals.

Strict application of vagueness and overbreadth doctrines to school disciplinary rules also thwarts the educational interest in regulating indecent student speech,

unduly limits discretion in disciplinary matters, and usurps community control over the development of disciplinary rules.

Question 3. The District Court erred in holding that removal of Fraser's name as a candidate for graduation speaker violated due process because the District's disciplinary rules did not specify such action as a potential form of punishment. School disciplinary rules need only provide students reasonable notice of potential penalties and significant procedural safeguards exist to correct arbitrary disciplinary actions.

Requiring each form of potential discipline to be set out in writing would pose a substantial burden on educators and deprive them of discretion to tailor punishment according to individualized circumstances. In light of the need for discretion to administer immediate and effective disciplinary action, and the procedural safeguards available under Washington law, the due process clause does not require the District to set forth each potential form of punishment in its disciplinary rules.

Question 4. The District Court erred in deciding *sua sponte* an issue of state law unrelated to Fraser's federal claims. The District Court raised the issue in a manner that substantially prejudiced the District because it had no opportunity to respond to the issue. The District Court's exercise of pendent jurisdiction over the state claim was also an abuse of discretion because the federal judiciary should not intervene in state law issues relating to the daily operation of the public schools. Finally, the District Court incorrectly determined the merits of the state law issue because the District fully complied with the requirements

for imposing a short term suspension upon Fraser under Washington law.

ARGUMENT

I.

THE DISTRICT DID NOT VIOLATE FRASER'S FIRST AMENDMENT RIGHTS

A. Student First Amendment Rights Must Be Viewed in Light of the Special Characteristics of the Public School Environment.

"Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Because of this compelling state interest in education, first amendment jurisprudence requires a delicate judicial balance between student expressive activities and the special characteristics and institutional needs of the public school environment. *Board of Education v. Pico*, 457 U.S. 853, 863-66 (1982); *Tinker v. Des Moines School District*, 393 U.S. 503, 506-09 (1969). These unique demands on the state in its role as educator further require a showing that basic first amendment freedoms are "directly" and "sharply" implicated prior to judicial intervention in the operation of the public schools. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This Court has also recognized that primary and secondary public schools not only provide academic instruction, but also socialize children for participation in our society through the inculcation of values:

> We have also acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). We are therefore

> in full agreement with the petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values' and that *'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'*

Pico, 457 U.S. at 864 (emphasis added); *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 496-505 (1981).

To maintain an environment in which these learning and socialization processes may occur, local school boards and school administrators must be entrusted with broad discretionary authority in student disciplinary matters. *New Jersey v. T.L.O.*, 469 U.S. —, 105 S. Ct. 733, 742-43 (1985); *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Student discipline is more than a means to maintain order within the confines of the school; in itself it is a "valuable educational device." *Id.* at 580. Because disciplinary actions implicate both the professional expertise of educators and a school's interest in the preservation of an orderly environment, judicial intervention must be carefully guarded. *See Wood v. Strickland*, 420 U.S. 308, 326 (1975).

Finally, a uniquely democratic process governs public education. In the Bethel School District, as in most public schools, a locally elected board of directors and professional educators determine educational policy, including disciplinary standards, with substantial input and scrutiny from parents and the public. Wash. Rev. Code § 28A.58.758 (1983). Expectations for student conduct are developed through this collaborative, democratic, and open process that necessarily reflects and transmits local values. *Pico*,

457 U.S. at 891-92 (Burger, C.J., dissenting); *id.* at 894-97 (Powell, J., dissenting); *Ingraham v. Wright*, 430 U.S. 651, 670-72 (1977). To avoid a national educational policy for standards of student conduct under the guise of constitutional interpretation, Fraser's first amendment claims must be evaluated in light of the need for substantial judicial deference to the political processes governing public education.

B. The Ninth Circuit Misapplied Tinker and the "Public Forum" Doctrine.

The majority opinion in the Ninth Circuit, however, ignored the District's interests in maintaining an educational environment compatible with these recognized interests. First, relying upon *Tinker*, the majority held the District was powerless to discipline Fraser absent a showing his speech provoked unmanageable behavior among other students or was "obscene" and not entitled to any constitutional protection. PA at A15-A16, A23 n.5. Second, it treated the all-school assembly at which Fraser spoke as a traditional "open public forum" for first amendment purposes. *Id.* at A41. Neither *Tinker* nor this Court's "public forum" doctrine warrants these holdings.

Tinker was a case of unconstitutional viewpoint suppression. Several students were suspended for wearing black arm bands symbolizing their opposition to United States involvement in Vietnam. The arm bands were neither offensive nor controversial for any other reason than disagreement with the political viewpoint they symbolically conveyed. The school's discipline was motivated by disapproval of the students' opinions on the war, and the action discriminated against this viewpoint by permit-

ting other forms of symbolic expression, such as the wearing of political campaign buttons or the "Iron Cross." 393 U.S. at 509-11. The students in *Tinker*, therefore, established a first amendment violation because the decisive factor for the school officials' action was an intent to suppress the students' viewpoint on a political issue. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49 n.9 (1983); *id.* at 58 (Brennan, J., dissenting).

Despite this viewpoint suppression, Justice Fortas opined that the challenged action would have been justifiable if the record contained facts "which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities." 393 U.S. at 514. Under *Tinker*, then, suppression of a student's viewpoint is constitutionally permissible only upon a showing of a substantial, actual or potential, disruption to the educational process or intrusion upon the "rights of other students." *Id.* at 508.

When school authorities discipline a student without regard to any viewpoint expressed, but rather for the indecent or offensive form of expression used, *Tinker's* "material disruption" standard is inapplicable. The black arm bands of *Tinker* did not confront the Court with the unique analytical problems of indecent or offensive student speech. *Thomas v. Board of Education*, 607 F.2d 1043, 1055 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 Geo. L.J. 37, 49 (1970). Although the record demonstrates that Fraser's speech did cause a substantial disruption of the educational process and invaded the rights of other students, his first

amendment claim fails on a more fundamental level because he did not make a threshold showing that the District's discipline was based upon an intent to suppress or otherwise discriminate against his viewpoint.

Also underlying the Ninth Circuit's analysis of Fraser's speech rights was the erroneous assumption that the nominating assembly was a traditional open public forum for first amendment purposes. PA at A29-A32, A40-A43. This Court has recognized three categories of first amendment fora: (1) the traditional open public forum; (2) the limited public forum (or forum by designation); and (3) the nonpublic forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, — U.S. —, 105 S. Ct. 3439, 3449-51 (1985); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 45-46. Despite these varying categories, "public forum" analysis is essentially a technique to determine whether situational restraints on expressive activity are justified in light of the government's need to preserve its property for its intended use. *Cornelius*, 105 S. Ct. at 3448; *id.* at 3457 (Blackmun, J., dissenting). *See* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Context and Content in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984). Given the emphasis in forum analysis on the compatibility of expressive activity with governmental use of property, this Court will decline to find a public forum exists if the principal function of the property would be disrupted by the expressive activity. *Cornelius*, 105 S. Ct. at 3450; *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966).

The District's all-school assembly was neither an open public forum nor a limited public forum, but a nonpublic

educational activity. Although it provided certain students an opportunity to speak in support of classmates running for associated student body office, "not every instrumentality used for communication . . . is a traditional public forum, or a forum by designation." *Cornelius*, 105 S. Ct. at 3450; *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 130 n.6 (1981). The District scheduled the assembly on a school day, during school hours, and it was open only to students and staff members, not the general public. During this school-conducted activity, the District retained the authority to set the agenda and to direct communicative activities toward specified educational goals. These characteristics of the assembly, like most aspects of a public school's educational program, bear no resemblance to recognized first amendment public fora.[2] *Cornelius*, 105 S. Ct. at 3461, n.3 (Blackmun, J., dissenting).

The District also had a continuing legal duty to supervise the activities at the assembly and the authority to discipline students in attendance. Under state law, the associated student body of Bethel High School is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the

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[2]School district property, however, may take on the characteristics of traditional first amendment fora depending on the activity involved. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (university policy allowing student groups access to meeting facilities created a limited public forum); *Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (open school board meetings for discussion of school business created public forum). Nevertheless, the focus in "public forum" analysis is on the particular channel of communication in which the dispute arises. *Cornelius*, 105 S. Ct. at 3448-49. The "relevant forum" in this litigation is the school assembly at which Fraser spoke.

school district in conformity to the rules and regulations promulgated by the superintendent of public instruction . . . ." Wash. Rev. Code § 28A.58.115 (1983). The state's administrative rules further define an associated student body "program" as:

> [A]ny activity which (a) is conducted in whole or part by or in behalf of an associated student body during or outside regular school hours and within or outside school grounds and facilities, and (b) if conducted with the approval and at the direction or under the supervision of the school district.

Wash. Admin. Code R. 392-138-010(2) (Supp. 1984). Finally, the school's rules define the "educational process" for the purpose of disciplinary rules as "all activities carried out during the school day." Pltf's Ex.B at 10, JA at 58-59. As a factual and legal matter, therefore, the assembly was not a public forum, but rather a nonpublic educational activity subject to the District's control.[3]

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[3]The Ninth Circuit's purported distinction between "curricular" and "extracurricular" activities does not support its assumption that the assembly was a first amendment public forum. PA at A34. The District's authority over the educational process is not limited to the presentation of academic materials in the classroom. The school assembly served the important educational goal of providing a limited model of self-government. The District's statutory authority over the activity, and the clear application of the school's disciplinary rules to the school assembly, demonstrate it was directly related to the educational program.

The assembly, moreover, neither resembles the forum by designation the court found in *Widmar v. Vincent* nor the definition of a "limited open forum" in the secondary schools that Congress defined in the Equal Access Act of 1984. 20 U.S.C. §§ 4071-4074 (Supp. 1985). In *Vincent*, the student organization sought only access to unoccupied meeting rooms generally available to other student organizations. This forum by designation did not involve an activity controlled and initiated by school

(Continued on next page)

Under this Court's precedents, the District's responsibilities over this nonpublic activity allowed viewpoint neutral restrictions on Fraser's expressive activity, if such restrictions were reasonable in light of the surrounding circumstances. *Cornelius*, 105 S. Ct. at 3453; *Perry*, 460 U.S. at 46. Nevertheless, a closer examination of the educational interests implicated by indecent or offensive student speech reveals that the District's viewpoint neutral disciplinary action was not only reasonable in light of the surrounding circumstances, but also a narrowly drawn restriction necessary to further the compelling state interests of the educational process. *See Perry*, 460 U.S. at 45-46. In sum, the record demonstrates that Fraser's speech was not constitutionally protected because it was strictly incompatible with the fundamental purposes of the District's educational program.

C. The District Has the Authority to Regulate Indecent Student Speech.

Because public education may inculcate community moral values and socialize students for participation in adult society, the maintenance of standards of decency in student discourse is an appropriate goal of the educational process. In *Thomas v. Board of Education*, Justice New-

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authorities. The Equal Access Act's definition of "limited open forum" applies only when "noncurricular related student groups" are allowed to "meet on school premises during noninstructional time." 20 U.S.C. § 4071(b) (Supp. 1985). The definitions of "noncurricular," "meeting" and "noninstructional time" in the Act further demonstrate that the District's legal responsibilities over the associated student body, its scheduling of the all-school assembly during ordinary instructional time, and the direct relation of the activity to curricular goals did not create a "limited open forum." *Id.*, § 4072.

man's concurring opinion summarized the educational interests at stake when school authorities attempt to control offensive student speech:

> School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. The task may be difficult, perhaps unlikely ever to be more than marginally successful. But whether a school condemns or tolerates indecent language within its sphere of authority will have significance for the future of that school and of its students. The first amendment does not prevent a school's reasonable efforts towards the maintenance of campus standards of civility and decency. With its captive audience of children, many of whom, along with their parents, legitimately expect reasonable regulation, a school need not capitulate to a student's preference for vulgar expression.

607 F.2d at 1057 (Newman, J., concurring). Simply put, correcting an adolescent's indulgence in sexually offensive expression is an expected and permissible function of the public schools. Haskell, *supra* p. 13, at 56.

The regulation of indecent or offensive student speech is also necessary to maintain a learning environment free of disruption. Under the Ninth Circuit's analysis, however, physical disorder, not disruption of the learning process, is the touchstone for permissible regulation. This approach would allow conduct far more offensive or sexually explicit than Fraser's to go unpunished if the only reaction from other students was shocked silence. Educational experts, let alone judges, lack a full understanding of how students learn and the complicated interrelationship of social and emotional factors influencing that process. Diamond, *supra* p. 11, at 497. As Justice Wright's dissenting opinion correctly noted, a "speech which causes

great distraction, excitement, or embarrassment among the students may disrupt the educational process as greatly as one which results in fist fights." PA at A61-A62.

The record demonstrates the District's determination that Fraser's speech caused a substantial disruption to the learning process was reasonable: (1) several students responded to the speech by simulating masturbation and acts of intercourse, JA at 36; (2) classroom discussions the following day were diverted to the topic of Fraser's speech, including student expressions of disgust and embarrassment, JA at 42-43, 101; and (3) Ms. Rindetta Stewart, an independent educational expert on sex equity in education, testified at trial that the speech was sexist, demeaning to female students, and disruptive to their learning processes. JA at 72-81. Because educators, not judges, can best determine both the potential for and existence of disruption in the educational environment, the lower courts erred by not recognizing that Fraser's speech posed a significant threat of disruption to the learning environment, and was substantially disruptive in fact.

Viewpoint neutral regulation of indecent student speech, moreover, does not implicate the core first amendment values of protecting the exchange of ideas. As Justice Stevens observed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978):

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. at 743 n.18. Similarly, in *Pico* the Court's opinions recognized that even in the voluntary realm of inquiry of

a school library, school officials have authority to remove indecent or offensive materials, provided that the motivating factor is neither the purposeful suppression of ideas, 456 U.S. at 871-72 (plurality opinion); *id.* at 879-81 (Blackmun, J., concurring); nor the selection of a particular viewpoint for prohibition. *Id.* at 918-20 (Rehnquist, J., dissenting). Given the deleterious effects indecent expressive activity has on the school environment, and the educational interest in correcting offensive expression, disciplinary actions for such speech that respect the government's fundamental obligation of viewpoint neutrality are constitutionally permissible. *See id.*; *Pacifica*, 438 U.S. at 744-51; *Young v. American Mini Theatres*, 427 U.S. 50, 69-71 (1976).

The District's interest in regulating indecent, but not constitutionally obscene, student speech is further warranted on nuisance grounds. *See Pacifica*, 438 U.S. at 750-51. The scope of the District's authority over student speech is geographically and temporally limited, in most respects, to the schoolhouse grounds and school day. The record does not allow an inference that Fraser was prohibited from indulging his taste for sexual humor with fellow students outside of the assembly or during nonschool time. The District's limited regulatory authority left him "ample alternative channels for communication." *Clark v. Community for Creative Nonviolence*, 468 U.S. —, 104 S. Ct. 3065, 3069 (1984). Because the District has an educational interest in deterring offensive speech at school, discipline for such expressive activity is analogous not only to removing the "pig from the parlor," but also to reprimanding a student for talking about the World Series during history class—a clearly permissible educational

prerogative. *See Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 545 (1980) (Stevens, J., concurring). The District's viewpoint neutral discipline, therefore, did not suppress completely Fraser's communicative activity, but only removed it from an environment where it posed the potential for harmful secondary effects. *See American Mini Theatres*, 427 U.S. at 69-73.

Subsumed within the District's general interest in regulating indecent student speech are other particular features of the educational environment that provide constitutionally sufficient grounds for its disciplinary action.

1. Protection of a Captive Audience

The District had an interest in protecting school children at the assembly from unconsented and unexpected exposure to Fraser's depiction of sexual activity. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a prohibition of political advertising on public transit buses. Relying upon both *Packer Corp. v. Utah*, 285 U.S. 105 (1932), and Justice Douglas' dissent in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court held that the city's managerial decision to limit advertising to less controversial topics so as not to impose upon the captive audiences of transit riders sustained the ban in light of the forum involved. 418 U.S. at 302-04.

Similarly, in *Pacifica* the Court sustained the imposition of penalties against a broadcaster that aired an offensive, but not constitutionally obscene, comedy monologue. The decision was based, in part, on the FCC's power to protect members of the broadcast audience, which included

children, from unexpectedly hearing indecent language on the radio. 438 U.S. at 748-49.

Finally, in *Cohen v. California*, 403 U.S. 15 (1971), Justice Harlan observed that the constitutional authority of government to regulate discourse to protect listeners is permissible upon a showing that "substantial privacy interests" are invaded in "an essentially intolerable manner." *Id.* at 21. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 113 (1973) (Brennan, J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting).

Under these precedents, discipline of Fraser's speech was necessary to protect a captive audience. Attendance in the District is mandatory for all children between the ages of 8 to 14 years, and for most children between the ages of 15 and 17. Wash. Rev. Code § 28A.27.010 (1983). Attendance at the assembly, moreover, was required for all students in the school, unless they opted to attend a study hall. JA at 101. Testimony indicated that students and staff present had no practical means of exiting the gymnasium during Fraser's brief talk. JA at 36-37.

Fraser's calculated and crude depiction of sexual activity invaded his listeners' privacy rights in an inescapable and intolerable manner. Sexuality is a sensitive topic for most persons in our society, perhaps acutely so for adolescents and young adults, and one that the judicial system has traditionally regarded as implicating substantial privacy interests. *Rowan v. Post Office Department*, 397 U.S. 728 (1970) (restrictions on mailing sexual materials). Ms. Stewart's testimony at trial opined that Fraser's speech was both sexually demeaning to female

students and threatened to invade their very "being." JA at 79. Attendees also had no warning that a talk describing the sexual prowess of a candidate for student office would be given. To be sure, students may have "averted their eyes" from the simulated intercourse or masturbation Fraser's speech provoked, but they had no choice but to endure his talk and, at best, try not to listen. Fraser's speech, therefore, violated fundamental privacy interests of other students in a manner warranting discipline based on the plight of a captive audience. *See Cohen*, 403 U.S. at 291; *Tinker*, 393 U.S. at 508.

2. Controlling Presentation of Sexual Topics to Children.

The District could also discipline Fraser's speech because of its authority to control the manner in which sexual topics are presented to school children. First amendment doctrine has long recognized that the state may regulate the dissemination of sexual materials to children, even if such materials are not "obscene." *E.g., Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). *See Paris Adult Theatre I*, 413 U.S. at 113 (Brennan, J., dissenting). This authority is founded upon the state's interest in preserving parental authority over sexual topics and its independent interest in the welfare of youth. *Ginsberg*, 390 U.S. at 639-40. It also extends to the protection of children from unexpected exposure to indecent sexual materials or other forms of offensive expression. *Pacifica*, 438 U.S. at 749-50.

Within the public school environment, the varying ages and levels of maturity of school children, and the diversity of parental attitudes and expectations for their

children concerning sexuality, create a strong educational interest in presenting sexual matters in a responsible manner. Indeed, presentation of this topic in an irresponsible fashion can have serious and permanent harmful effects on adolescents. *Trachtman v. Anker*, 563 F.2d 512, 519-20 (2d Cir. 1977).

An administrative rule of the Washington State Board of Education demonstrates these concerns. The rule provides:

> The decision as to whether or not a program about sex education or human sexuality is to be introduced into the common schools is a matter for determination at the district level by the local board, the duly elected representatives of the people of the community. . . .

Wash. Admin. Code R. 180-50-140(1) (1983). The rule further mandates involvement of parents and community groups in the planning and evaluation of instruction on these topics, and requires school districts to allow parents to excuse their children from any planned instruction. Like this rule, the District's discipline of Fraser for his irresponsible depiction of sexual activity before the entire school population was a legitimate attempt to regulate how information on this sensitive and potentially harmful topic will be presented to impressionable adolescents, and to reinforce parental authority over the flow of information on the subject. *See Trachtman v. Anker*, 563 F.2d at 519-20; Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321, 375-79 (1979). *See also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (*dicta* recognizing schools may withhold information from students reasonably regarded as harmful).

3. Dispelling the Impression of District Approval.

The District's actions were futher necessary to dispel any impression among students and the public that it approved of speech incompatible with its educational program. A public school has an "important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program." *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981). Similarly, an undispelled impression that school officials tolerate speech demeaning to female students may be more harmful than the speech itself. *See Ginsberg v. New York*, 390 U.S. at 642-43. The District's plenary authority over the campaign assembly carried a substantial risk that impressionable students (or parents) would perceive Fraser's conduct as authorized absent disciplinary action.

The discipline also furthered the educational policy of Congress and the State of Washington to provide equal educational opportunity to female students. The Equal Rights Amendment of the Washington Constitution, Article XXXI, § 1 (Amendment 61), and Chapter 28A.85 of the Washington Revised Code, mandate that each school district maintain educational programs free from discrimination on the basis of sex. Title IX of the Federal Education Act Amendments of 1972, 20 U.S.C.A. § 1681 (1978), contains similar prohibitions. As the District's expert testified, Fraser's depiction of sexual activity was uniquely demeaning to female students and was a form of sexual harassment. JA at 78-80.

In the analogous context of employment discrimination law, both Washington and federal courts have required

employers to correct and prevent conduct, including sexually harassing speech, that creates a hostile work environment for female employees. *See Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Glasgow v. Georgia Pacific Corp.*, 103 Wash. 2d 401, 693 P.2d 708 (1985). Based on the potentially harmful effect Fraser's speech had on female students and their learning environment, and the need to remove an imprimatur of official tolerance, the District promoted recognized public educational policy by disciplining Fraser.

4. The Constitutional Rights of School Children Are Not Co-extensive With Those of Adults.

Affording indecent student speech constitutional protection also does not further the underlying rationales for student free expression rights. Both *Pico* and *Tinker* recognize that student first amendment rights serve instrumental values of helping to prepare students for effective participation in the political and social processes of adult society. 457 U.S. at 868; 393 U.S. at 512. *See* Garvey, *supra* p. 24, at 344-56. In contrast, adult first amendment values are both instrumental and ends-in-themselves, and are predicated upon the assumption that sellers and buyers in the marketplace of ideas make their decisions in an informed and mature manner. *Cohen v. California*, 403 U.S. at 24. See L. Tribe, *American Constitutional Law* 576-79 (1978). For secondary public school students, even those approaching graduation, this assumption cannot be made because they remain subject to the government's interest in teaching students community standards of decency in communicative activity.

A minor's inability to exercise a mature or informed choice may limit the exercise of his or her first amendment rights. *Tinker*, 393 U.S. at 315 (Stewart, J., concurring); *Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring). In the school environment, unfettered student expressive activity of an indecent or offensive character thwarts the educational goals of teaching students socially responsible standards of behavior and respect for others' sensibilities. Permitting such activity impedes, not promotes, the instrumental values underlying student first amendment rights. To be sure, constitutionally protected expressive activity of adults can be as eloquent or tasteless as the speaker desires; but for student speakers and audiences, who are presumptively incapable of making mature decisions on such matters, viewpoint neutral regulation of indecent or offensive expression is permissible because of the particularized and compelling needs of the educational process, and the correspondingly lesser free expression rights of children.

D. Fraser Failed to Show the District Suppressed his Viewpoint.

Given these educational interests in regulating indecent speech, the District's disciplinary action was reasonable in light of the surrounding circumstances. The record demonstrates the discipline was based upon the strict incompatibility of Fraser's speech with the District's educational purposes—i.e., the predictable threat of disruption to the learning process indecent student speech involves and the substantial disruption Fraser's speech actually caused. Most significantly, however, the record is devoid of evidence that the District's action was motivated by

disagreement with any viewpoint Fraser expressed. *Pico*, 457 U.S. at 871-72; *Tinker*, 393 U.S. at 510-11; *id.* at 526 (Harlan, J., dissenting). Accordingly, he failed to demonstrate a constitutional violation.[4]

Recognizing the District's constitutional authority to regulate indecent, but not constitutionally obscene, student speech does not grant unbridled discretion to school administrators. The Ninth Circuit's fear that an "amorphous standard of 'indecency' " would "increase the risk of cementing white, middle class standards for determining what is acceptable and proper speech and behavior in our public schools," (PA at A28-A30), elevates a student's preference for offensive forms of expression over the compelling interests of the educational process, the rights of other students, and the societal interest of inculcating values determined by democratically elected local school boards. Surely, the far greater constitutional danger is unelected federal judges destroying the public's expectations of decency and civility in the public schools by placing offensive student speech beyond the pale of constitutionally sound disciplinary action.

The record evidences no intent by the District to suppress whatever viewpoint Fraser sought to convey in his talk. District officials reasonably believed his depiction of sexual activity to a captive audience imposed upon other students' privacy and disrupted the learning environment. The action was motivated by nothing more than the Dis-

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[4]Although the record lacks credible evidence that the District had a constitutionally impermissible motive in disciplining Fraser, in cases involving "mixed motive" discipline the analysis of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-87 (1977) should be controlling.

trict's constitutionally sound interest in regulating indecent expressive activity. Because Fraser failed to make a threshold showing that the District engaged in viewpoint suppression or discrimination, and because his speech both threatened and caused a substantial disruption to the learning process, the holding that his first amendment rights were violated must be reversed.

II.

THE DISTRICT'S DISRUPTIVE CONDUCT RULE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD

The Court of Appeals affirmed the District Court's judgment that the District's disruptive conduct rule was "unconstitutionally vague, uncertain, and indefinite" under the due process clause because it failed "to define and clarify what constitutes material and substantial disruption of the educational process." PA at B8, A43 n.12. The District Court further concluded that the rule was "substantially overbroad" because it was "so drawn as to sweep within its ambit protected speech or expressions of other persons not before the court." PA at B8. Based on the unique demands of the educational process and the recognized need for flexibility in student disciplinary matters, these conclusions were in error.

The Constitution permits local school authorities considerable flexibility in student disciplinary matters. In *Goss v. Lopez*, the Court emphasized the need for an "intensely practical" application of the due process clause to student disciplinary matters. 419 U.S. at 377-78. Similarly, in *New Jersey v. T.L.O.*, the Court observed that "maintaining security and order in the schools requires a certain

degree of flexibility in disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." 105 S. Ct. at 743. *See Goss*, 419 U.S. at 582-83; *Ingraham v. Wright*, 430 U.S. at 680-82. These considerations apply alike to the determination of what constitutes fair notice to students of proscribed conduct under student disciplinary rules.

This Court's vagueness doctrine attempts to reconcile the competing interests of fair warning of proscribed conduct with the linguistic difficulty of framing limitations on conduct that may arise in an infinite variety of factual situations. *Arnett v. Kennedy*, 416 U.S. 134, 159-60 (1974). In *Kennedy*, the Court upheld a statute authorizing discipline of federal employees for "such cause as will promote the efficiency of the service. . . ." *Id.* at 158. The Court's observations concerning problems confronting public employers in drafting employee disciplinary rules apply with equal, if not greater, force to student disciplinary rules:

> Because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is grounds for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal . . . in *Meehan v. Macy*, [392 F.2d 822, 835, *aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969)]:
>
> > [I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catch-all' clauses pro-

> hibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' . . .

416 U.S. at 161. Vagueness, therefore, must be judged in light of the particular context of the school environment. *See Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972).

Concerning school disciplinary rules, most circuit courts addressing the issue have refused to hold such rules to the same due process standards for vagueness and overbreadth as criminal statutes.[5] *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 441 (5th Cir. 1973); *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Norton v. Discipline Committee*, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970). As noted in *Murray v. West Baton Rouge Parish School*

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[5]Several decisions have invalidated similarly worded rules applied to prohibit distribution of literature. *Hall v. Board of Commissioners*, 681 F.2d 965 (5th Cir. 1982); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975). Similarly, this Court in *Papish v. University of Missouri*, 410 U.S. 667 (1973) (per curiam) reversed disciplinary action against a university student that had distributed a newspaper on a university campus in violation of a rule prohibiting "indecent conduct or speech." *id.* at 621. These cases, however, are distinguishable. First, distributing literature is far less intrusive to privacy and disruptive to the educational process than indecent speech at a school sponsored educational activity with a captive audience. Distribution or possession of literature by students on school grounds also does not pose as great a risk of implicit school approval of the material's content, and, usually, the audience is not "captive." Second, *Papish* involved a university environment, not a secondary school. Because university students are older and presumably more mature, and because university education is not characterized by value inculcation and socialization goals, *Papish* did not address the unique first amendment considerations applicable to the secondary school environment.

Board, which involved state statutes establishing student disciplinary rules prohibiting "willful disobedience," "immoral or vicious practices," and conduct that "disturbs the school":

> The statutory proscriptions at issue here are unquestionably imprecise. It is clear, however, that school disciplinary codes could not be drawn with the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording of a statute is, in fact, being used to infringe on first amendment rights . . . we must assume that school officials are acting responsibly in applying the broad statutory command.

Id. at 442 (citations and footnotes omitted).

The District's rule prohibits "conduct" that "materially and substantially interferes with the educational process," including the use of "obscene, profane language or gestures." The hearing officer on Fraser's grievance construed the term "obscene" to mean conduct or language "offensive to modesty or decency; indecent, lewd." JA at 103. In the high school context, this was a reasonable construction of the disciplinary rule and should be accepted by this Court. *See McCluskey v. Board of Education*, 458 U.S. 966, 968-69 (1982) (per curiam); *Wood v. Strickland*, 420 U.S. at 325.

More significantly, the rule was sufficient to give Fraser fair warning that a speech to the entire student body deliberately depicting sexual activity, delivered to emphasize its sexual connotations, was prohibited. There are "limitations in the English language with respect to being both specific and manageably brief." *CSC v. Letter*

Carriers, 414 U.S. 548, 578-79 (1973). Furthermore, the delicate nature of the learning environment and the school's *in loco parentis* authority in student disciplinary matters require rules against conduct that would be permissible if undertaken by adults. *T.L.O.*, 105 S. Ct. at 742-43. Given the limitations of language, the boundless creativity of school children to find new ways to disrupt the learning process, and the compelling need to maintain order in the school environment, the disruptive conduct rule as applied to Fraser was not unconstitutionally vague.

These same factors also sustain the rule against the overbreadth challenge. The rule proscribes conduct that results in a material and substantial interference with the educational process. To the extent the rule regulates "speech," i.e., "obscene" or "profane" language, it is based upon a reasonable forecast that such expressive activity will be incompatible with the educational environment. Even under *Tinker*'s forecast of "disruption" standard, the rule only purports to proscribe conduct or speech "not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513.

The rule also does not permit application to protected speech because it is viewpoint neutral on its face and seeks only to further legitimate goals of the educational environment. Nothing in the rule reflects an intent to suppress ideas or single out certain viewpoints for special treatment. Instead, the rule seeks only to channel the form of student speech away from "obscene" or "profane" language because of the potentially disruptive effect. Absent evidence the District used the broad language of the disruptive conduct rule to suppress student viewpoints,

the presumption must be that the District has and will act properly in administering the rule. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d at 442.

In light of these circumstances, the disruptive conduct rule is not substantially overbroad. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court emphasized that facial overbreadth analysis is not warranted when the proscription under consideration is subject to a limiting construction and the prohibited expressive activity is within the legitimate authority of government to proscribe. *Id.* at 611-16. The District's own interpretation of its disruptive conduct rule limits its viewpoint neutral ban to speech that is within the school's constitutional authority to regulate. This regulation of offensive student speech, moreover, is more akin to the regulation of conduct, not "pure speech," because of the deleterious effect such expressive activity has in the school environment. *See id.* at 615-16. Any potential overbreadth in the District's disruptive conduct rule, therefore, is neither real nor substantial when judged against its legitimate sweep. *Id.*

Most significantly, stringent application of the vagueness and overbreadth doctrine is incompatible with the school environment. Both the District Court's oral opinion and the majority in the Ninth Circuit intimated that to prohibit sexually suggestive speech, school disciplinary rules must define specifically the types of language or conduct prohibited in the same manner as criminal statutes prohibiting the dissemination of obscene materials. PA at A23 n.5, B-18-B19. *See Miller v. California*, 415 U.S. 15, 23 (1973) (requiring specific definition of sexual conduct in criminal obscenity statute). This standard,

however, equates the constitutional interests at stake when school authorities regulate student speech at school with those of the state when it prosecutes pornographers. A specific description of prohibited language or activity in a student rule book would (1) set an inflexible standard unduly limiting schools officials' discretion; (2) tempt students to engage in otherwise offensive, but undefined, expressive activity; and (3) convey information considered offensive and shocking in itself to many students and parents. Even a casual perusal of criminal statutes considered by this Court demonstrates that requiring specific definitions of indecent language or conduct to appear in school disciplinary rules would be unworkable. *E.g.*, *Ginsberg*, 390 U.S. at 645-46.

Finally, a rigid application of both vagueness and overbreadth standards to school disciplinary rules would thwart the ability of parents, professional educators, and elected school boards to develop a consensus on school disciplinary matters. In the Bethel School District, like many other districts across the country, school disciplinary rules must be developed with substantial input from parents and the community, subject to the board of directors' control. Wash. Rev. Code § 28A.58.1011 (1983); Wash. Admin. Code R. 180-40-225 (1983). Interjecting criminal law standards of specificity into the drafting of these rules would thwart this process of community development of educational policy, as well as the flexibility needed to administer discipline as an educational tool. Given these institutional needs of the educational process, the disruptive conduct rule is neither unconstitutionally vague nor substantially overbroad.

III.

THE DISTRICT DID NOT VIOLATE FRASER'S RIGHTS UNDER THE DUE PROCESS CLAUSE BY FAILING TO DEFINE EACH FORM OF DISCIPLINARY ACTION THAT COULD BE IMPOSED

The District Court held that the removal of Fraser's name as a candidate for graduation speaker violated his due process rights under the fourteenth amendment, apparently because the District's disciplinary rules did not specify such action as a potential form of punishment. PA at B9, B23.[6] This holding, however, was in error for the same reasons that sustain the District's disruptive conduct rule against vagueness and overbreadth challenge.

School disciplinary rules need only place students on reasonable notice that certain types of general conduct are prohibited within the confines of the school environment. The Bethel High School Student Handbook informs students that commission of acts defined as disciplinary offenses, including the school's disruptive conduct rule, may result in "[d]isciplinary action, including suspension and up to expulsion . . . ." Def.'s Ex. B, p.6. JA at 58-59. Furthermore, the Washington State Board of Education's

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[6]Because Fraser did speak at the graduation ceremony in 1983, the Court of Appeals correctly vacated the District Court's injunction requiring the District to make him a graduation speaker as moot. Nonetheless, this question, along with the remaining questions accepted for review, is not moot because Fraser's complaint sought monetary damages for violation of his civil rights and the trial court awarded him damages in the amount of $278.00. JA at 3-12; PA at C4-C5. Both Fraser and the District, therefore, have a personal stake in the outcome of this litigation that remains "live" on appeal. *Powell v. McCormick*, 395 U.S. 486 (1969) (challenge to exclusion from the House of Representatives not moot after the plaintiff was seated because of claim for withheld salary).

regulations concerning disciplinary rules for school districts, under which the District's disciplinary rules were adopted, define "discipline" as "all forms of corrective action or punishment, other than suspension and expulsion" and further specify that "discipline shall also mean the exclusion of a student from any other type of activity conducted by or in behalf of a school district." Wash. Admin. Code R. 180-40-205(1) (1983). Finally, the state's administrative rules grant students and their parents or guardians the right to grieve any disciplinary action to the building principal, and to appeal an adverse decision of the principal to the school board. Wash. Admin. Code R. 180-40-240 (1983).

In the school environment, this definition of "discipline" and the procedural safeguards afforded by the grievance review process satisfy due process requirements. In *Ingraham v. Wright*, the Court rejected a due process challenge to school corporal punishment partially because of the practical difficulties involved in requiring extensive hearing rights prior to punishment. 430 U.S. at 680-82. Those same considerations apply to specified written penalties for disciplinary offenses. Such a universal constitutional requirement governing teacher disciplinary practices would not only impose a substantial additional burden on educators, but also deprive them of discretion to tailor punishment according to individualized circumstances. An effective punishment for one student may be disastrous for another. Given the infinite variety of circumstances in which the need for discipline may arise, a due process requirement that each punishment for a school offense be set out in writing would thwart the recognized need for immediate and effective disciplinary action and

usurp the discretion of school authorities to choose appropriate means of maintaining order in the school. *Id.*; *Goss v. Lopez*, 419 U.S. at 580.

The existing procedural safeguards under Washington law are sufficient to protect a child's interest in knowing what forms of corrective action may be imposed. Wash. Admin. Code R. 180-40-240 (1983). Even assuming the District's removal of Fraser's name from the list of graduation speakers implicated constitutionally protected property or liberty interests, the right to grieve the disciplinary action was a sufficient safeguard against arbitrary punishment. Because school rules identifying each form of potential punishment for student offenses are neither educationally desirable nor practical, and because adequate procedural safeguards exist to review disciplinary actions under state law, the judgment should be reversed.

IV.

THE DISTRICT COURT ERRED IN RAISING AND DECIDING STATE LAW ISSUES SUA SPONTE

The District Court also concluded that the District's three-day suspension of Fraser violated certain provisions of the Washington Administrative Code. PA at B9. Because the District Court raised the issue in a manner that substantially prejudiced the District, and because pendent jurisdiction over the state law issue should not have been entertained, reversal on abuse of discretion grounds is necessary. In addition, the District Court's determination of the state law issue was erroneous.

The District had no opportunity to respond to the trial judge's *sua sponte* decision on the state law issue.

Fraser's complaint was confined to federal constitutional and civil rights claims. JA at 3-12. During the trial, neither party expressly nor impliedly consented to resolution of this issue. Indeed, the District's first notice that the trial judge would decide the issue came after the hearing when the District Court entered its findings of fact and conclusions of law and thus precluded the District from any meaningful opportunity to respond or even request a continuance. By analogy to Rule 15(b) of the Federal Rules of Civil Procedure, these actions by the trial court substantially prejudiced the District and were an abuse of discretion. *See Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977); *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969). 3 J. Moore, *Moore's Federal Practice* ¶ 15.13[2] (2d ed. 1983) (citing cases).

The District Court's decision to exercise pendent jurisdiction was also an abuse of discretion. The pendent jurisdiction doctrine rests on discretionary principles. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Even when a federal court has the power to assert pendent jurisdiction, the circumstances of the claim, including fairness to the litigants and considerations of comity, public policy, and federal-state relationships must be addressed. *Id.* at 726-27; *Hagans v. Lavine*, 415 U.S. 528, 545-49 (1974).

In the area of student first amendment rights and school discipline, this Court has repeatedly stressed the need for the federal judiciary to refrain from needless interference in the day-to-day operation of the public schools. See sections I and II *supra*. The issue decided *sua sponte* by the District Court was limited to a state

regulation concerning student suspensions. It was wholly unrelated to enforcement of Fraser's alleged first amendment and due process claims, and implicated educational policy issues of unique concern to state and local authorities. Even in federal civil rights litigation, federal courts are not the appropriate forum to review state law issues affecting sensitive topics of public school management. *Wood v. Strickland*, 420 U.S. at 326. *See also Berns v. Civil Service Commission*, 537 F.2d 714, 717 (2d Cir. 1976) (reversing exercise of pendent jurisdiction over state civil service law issue); *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976) (upholding district court refusal to decide state law issues concerning nonrenewal of teacher contract). Under these circumstances, the *sua sponte* exercise of pendent jurisdiction was an abuse of the trial court's discretion.

Finally, the District Court's substantive determination of the state law issue was in error. Although the District was precluded from any opportunity to introduce evidence on this issue, the decision of its hearing officer fully addressed the question of the District's compliance with the rule at issue. Wash. Admin. Code R. 180-40-245(2) (1983). The rule provides in pertinent part that no short-term suspension may be imposed upon a student "unless other forms of corrective action or punishment reasonably calculated to modify his . . . conduct have failed, or unless there is good reason to believe that other forms of corrective action or punishment would fail if employed."

The hearing officer concluded that "[b]ased upon prior warning given to Matt Fraser concerning delivery of his speech, imposition of a short-term suspension and

discipline was justified because the District had good reason to believe that other forms of corrective action or punishment would fail if employed." JA at 104. Fraser's response to the discipline was that he had done nothing warranting punishment. His attitude justified the District's belief that a less severe form of punishment than a three-day suspension would not correct his behavior.

The District Court's reliance on *Quinlan v. University Place School District*, 35 Wash. App. 260, 660 P.2d 329 (Wash. Ct. App. 1983), was also misplaced. *Quinlan* held only that school district rules could not establish a predetermined suspension penalty because the state board's rules require assessment of the individual student's circumstances in every suspension action. The District did not rely on any predetermined penalty rule in punishing Fraser and assessed his individual circumstances. JA at 102, 104. Accordingly, even if the District Court properly reached the state law issue, it must nonetheless be reversed on the merits.

V.

CONCLUSION

For the reasons stated above, the District respectfully urges the Court to reverse and vacate the judgments of the Ninth Circuit Court of Appeals and the trial court, including the award of monetary damages, declaratory relief, attorneys' fees and costs, and remand the case to the

District Court with instructions to enter an order of dismissal with prejudice. In the alternative, the District requests reversal and vacation of the judgments, and an order of remand for further proceedings consistent with appropriate constitutional law standards.

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